

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRACY D. EANES

Claimant

VS.

CARGILL, INC.

Respondent

AND

CHARTIS CASUALTY CO.

Insurance Carrier

Docket No. **1,047,994**

ORDER

Respondent and its insurance carrier appealed the May 14, 2010, preliminary hearing Order for Compensation entered by Special Administrative Law Judge Thomas F. Richardson.

ISSUES

Claimant alleges he aggravated a hammertoe and bunion on his right foot by wearing steel-toed boots at work. The Special Administrative Law Judge (SALJ) found claimant's injury was compensable under the Workers Compensation Act (Act) and awarded claimant both temporary total disability compensation commencing April 7, 2010, as well as medical compensation. The SALJ reserved for future determination the issues regarding past due temporary total disability compensation and the payment of unpaid medical expenses.

Respondent argues claimant's foot condition did not arise out of his employment as wearing shoes and walking are activities of daily living and claimant's injury would have occurred whether he was working or not. In addition, respondent argues there is evidence that claimant's hammertoe and bunion should have been repaired before he began working for respondent. Respondent further argues the Board should deny claimant's request for benefits.

The claimant argues he has presented expert medical evidence that establishes his working 8 to 10-hour days in steel-toed boots aggravated the deformities in his right foot

and that the steel-toed boots he wore at work would be worse on his foot than regular shoes. Claimant also contends he passed a physical before being hired by respondent and there is nothing in the record to support respondent's contention that he needed foot surgery before commencing work for respondent. Accordingly, claimant requests the Board to affirm the SALJ's determination that this claim is compensable but to modify the preliminary hearing Order for Compensation to order payment of past due temporary total disability benefits and the unpaid medical expenses.

The issue before the Board on this appeal is whether claimant injured or aggravated his right foot in an accident that arose out of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began working for respondent in its meat processing facility in late October 2008. That work required him to wear steel-toed boots, which was the first time in his career that he wore that type of footwear. In his two previous jobs for other employers, stacking lumber at a Tennessee sawmill and wrapping items for shipping, he wore tennis shoes. Despite being constantly on his feet in those former jobs, claimant experienced no problems with his feet.

Claimant's right foot has a hammertoe, which he believes developed some five or six years before he started working for respondent. He also believes he has had bunions on his right foot even longer. Neither condition, however, was symptomatic when claimant began working for respondent. And, when claimant began working for respondent he had never received medical treatment for either condition.

Claimant believes he began experiencing pain in his right foot in either December 2008 or January 2009. On January 22, 2009, claimant saw Layne Dameron, D.P.M. for his foot pain. The doctor's office notes from that visit indicate claimant had severe foot pain, which had been gradually progressing for several weeks. The doctor diagnosed a severe bunion hammertoe deformity causing extreme pain. Dr. Dameron recommended conservative treatment but they also discussed potential surgery.

On January 30, 2009, claimant visited a physician's office where he saw nurse practitioner Marcia Snodgrass. Claimant had complaints of pain in the right great toe that radiated into his second and third toes. Ms. Snodgrass noted claimant had an infection and abscess on the top of the second toe, which was the hammertoe. According to Ms. Snodgrass, it is not unusual for a hammertoe to rub against a shoe or boot as the toe sticks up and will not flex downward. Ms. Snodgrass, in some of her notes, indicated claimant's foot problem was a personal problem as she did not initially understand that claimant was relating it to work. She testified, in part:

Q. (Mr. Bangerter) Why did you pick the option illness or personal injury?

A. (Ms. Snodgrass) Because Tracy never brought it up to me that he felt this was a work-related issue until kind of later on into the game. And maybe I was just oblivious; maybe I didn't hear him right, but I did not take it as a work. Because usually I refer all my work-related injuries back to the plant pretty immediately, because that's what they have requested us to do. And so at that time he had not actually brought it up to me to do that.¹

Claimant believes that in March 2009 he showed his right foot to his supervisor, Tom Klenke, and told Mr. Klenke that the steel-toed boot was causing the problem. Claimant testified that he advised Mr. Klenke that his foot had to be fixed and that Mr. Klenke told him to get it fixed as he qualified for FMLA and short-term disability benefits of \$149 per week. Knowing he could not support his family on \$149 per week, claimant pulled his boot back on and returned to work.

On July 13, 2009, claimant advised his supervisor that he could not work any longer due to his foot. Claimant was sent to the plant nurse but was told he had to wait a couple of hours until the next shift nurse arrived. Claimant reported the situation to his supervisor and left the plant. Claimant arranged to return to Ms. Snodgrass, who began treating claimant's foot and referred him back to Dr. Dameron. On August 20, 2009, Dr. Dameron operated on claimant's hammertoe and bunion. Ms. Snodgrass followed claimant after his surgery and hospitalized him after discovering an infection at the surgical site. Because of ongoing pain and swelling in the second toe, Ms. Snodgrass referred claimant to a foot specialist in Hutchinson. Lacking insurance, claimant has been unable to consult with that specialist.

Three of respondent's witnesses, Nicholas R. Flick (a co-worker of claimant), Daryl Kuker (respondent's rendering manager), and George S. Moore (respondent's rendering superintendent), testified that claimant had told them that he had initially hurt his foot about five years ago when he jumped off a log while fishing. Mr. Flick believes he noticed claimant limping shortly after he commenced working for respondent. But Mr. Kuker and Mr. Moore do not recall seeing claimant limp before the summer of 2009.

Claimant testified he received short-term disability benefits through respondent for the period from July 26 through October 23, 2009. He also indicated respondent did not explain the differences between a personal injury, which would entitle him to receive short-term disability benefits, and a work-related injury for which he would be entitled to receive workers compensation benefits. Indeed, the claimant initially believed his foot problems comprised a personal injury as they stemmed from a preexisting condition.

¹ Snodgrass Depo. at 10-11.

In early January 2010, Dr. Dameron wrote claimant's attorney a letter in which the doctor stated that working 8 to 10-hour days on his feet in steel-toed boots aggravated claimant's foot deformities to the point he was unable to work or walk without extreme pain. Accordingly, the doctor felt claimant's foot problems comprised a workers compensation injury.

As indicated above, the primary issue in this appeal is whether claimant's work caused or contributed to his right foot problems. The SALJ considered the above evidence and determined claimant had aggravated his foot at work. The undersigned Board Member agrees.

This Board Member finds the evidence compiled to date establishes that claimant's steel-toed rubber boots and the moisture in those boots aggravated claimant's preexisting foot problems. As Ms. Snodgrass indicated, the rigid steel toes in claimant's boots rubbed the bunion or abscess on claimant's toe.

-- the infection was on the top of that toe right at the joint. And it's - because of a hammertoe, they bend up, okay, and you can't straighten that toe. So what happens is it rubs and rubs and rubs on your shoes and that develops like a callous, and that callous can develop into an infection and a sore, then it gets infected and very painful is what the process is.²

--[the steel-toed boots] can aggravate it more. It probably could. You know, it's hard to say. Every shoe aggravates a hammertoe; it doesn't matter what you wear; if you wear them too tight; if they're too stiff like the steel would be.³

And Ms. Snodgrass also indicated the moisture in the rubber boots was a factor in the bunion or abscess breaking open.

You know, it wasn't opened at the time he started working out there, okay? But it did become more open as he worked out in the - - because he wears rubber boots, the moisture, the weather; and of course, any moisture or anything is going to open that. Because it's a soft area anyhow and it's going to bust it open. So, you know, both probably should have been corrected before he did. But I think the bunion or the infection, the abscess on top got worse, you know.⁴

Finally, Dr. Dameron, the podiatrist, concluded claimant's foot problems were directly related to his work.

² *Ibid.* at 4.

³ *Ibid.* at 29.

⁴ *Ibid.* at 16.

When dealing with preexisting medical conditions, the test is not whether the accident at work caused or created the condition but, instead, whether the accident aggravated or accelerated the condition. The Kansas Supreme Court in *Strasser*⁵, wrote in pertinent part:

The workmen's compensation act prescribes no standard of health for workmen, and where a workman sustains an accidental injury arising out of and in the course of his employment he is not to be denied compensation merely because of a pre-existing physical condition, for it is well settled that an accidental injury is compensable where the accident serves only to aggravate or accelerate an existing disease or intensifies the affliction.⁶

The Act specifically provides that workers are entitled to receive compensation when preexisting conditions are aggravated but the compensation received for such aggravation is reduced by the amount of preexisting functional impairment.⁷ The Act also defines an injury as any lesion or change in the physical structure of the body but it is not essential that such lesion or change be of such character as to present external or visible signs of its existence.⁸

This Board member finds there is a direct relationship between claimant's right foot problems and the work he performed for respondent. Accordingly, claimant has established that his right foot problems arose out of his employment with respondent and, therefore, he should receive benefits under the Act. The preliminary hearing Order for Compensation should be affirmed.

Claimant asks the Board to review the SALJ's specific finding that claimant's request for past due temporary total disability benefits and past due medical benefits should be reserved for future determination. The Board does not have jurisdiction to review those issues at this juncture of the claim and, therefore, claimant's request must be denied.⁹

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

⁵ *Strasser v. Jones*, 186 Kan. 507, 350 P.2d 779 (1960).

⁶ *Ibid.*, Syl.¶ 2.

⁷ See K.S.A. 2009 Supp. 44-501(c).

⁸ K.S.A. 2009 Supp. 44-508(e).

⁹ See K.S.A. 44-534a(a)(2).

¹⁰ K.S.A. 44-534a.

as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, it is the finding of this Board Member that the Order of Special Administrative Law Judge Thomas F. Richardson dated May 14, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Thomas F. Richardson, Special Administrative Law Judge

¹¹ K.S.A. 2009 Supp. 44-555c(k).